FILED
SEP 9 1997
CLERK

No. 97-261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY DILLON, *et al.*,

Petitioners,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT, GERALD HANAS, NIPPON SHARYO KAISHA, LTD., SUMITOMO CORPORATION, LOUIS T. KLAUDER & ASSOCIATES, WILLARD BLEWETT and DAVID RIORDAN,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD P. KUKER
Counsel of Record
LAUREN K. KROEGER
HOEPPNER, WAGNER & EVANS
103 East Lincolnway
P.O. Box 2357
Valparaiso, Indiana 46384
(219) 464-4961
(219) 465-0603 FAX

Attorneys for Respondent
WILLARD BLEWETT

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

13 pp

QUESTION PRESENTED

I. Whether the Indiana Court of Appeals correctly held that Plaintiffs' state tort claim did not rise to the level of a constitutional violation, and that neither the "state-created danger" exception nor the "state-restricted alternatives" exception applies under the facts of this case?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

Plaintiffs' State Tort Claim Does Not Rise To The Level Of A Constitutional Violation. The General Rule Is That Governments Do Not Owe A Constitutional Duty To Guarantee Minimal Levels Of Safety And Security To The Public And To Protect Them From Harm. There Is No Conflict Among The Circuits As To Recognizing Or Applying Either The "State-Created Danger" Exception Or The "State-Restricted Alternatives" Exception. Neither The "State-Created Danger" Exception Nor The "State-Restricted Alternatives" Exception Applies Under The Facts In This Case ... 2

CONCLUSION 9

TABLE OF AUTHORITIES

Cases PAGE

Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) 7, 8

Collins v. City of Harker Heights, 503 U.S. 115 (1992) 2, 3, 4, 7

Dorothy J. v. Little Rock School Distr., 7 F.3d 729 (8th Cir. 1993) 5, 6

Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993) 6

In re: Train Collision in Gary, Indiana, 670 N.E.2d 902 (Ind. Ct. App. 1996) 2

Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996) 6

Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 165, 133 L.Ed.2d 107 (1995) 4, 5

Searles v. Southeastern Pennsylvania Transp. Auth., 990 F.2d 789 (3d Cir. 1993) 3, 4, 7

Statute

42 U.S.C. § 1983 ..... 1, 2, 4, 6

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Willard Blewett respectfully requests that this Court deny the petition for writ of certiorari. The Indiana Court of Appeals' decision is consistent with previous decisions of this Court, and other federal circuit courts. The Plaintiffs have failed to show any appropriate reason for this Court to review the well-reasoned decision of the Indiana Court of Appeals. The issues raised in this case do not rise to the level of paramount importance to the nation.

STATEMENT OF THE CASE

This case arises out of a collision of two trains in Gary, Indiana on January 18, 1993. Defendant Willard Blewett was a train engineer operating the westbound train at the time of the collision. In Count II of the Fifth Amended Complaint, the only Count directed to defendant Blewett, Plaintiffs attempted to allege civil rights violations under 42 U.S.C. § 1983 against the railroad and other defendants, including Willard Blewett. The allegations of constitutional violations against Willard Blewett arise out of alleged acts relating to his operation of the westbound train as its engineer.

REASONS FOR DENYING THE WRIT

Plaintiffs' State Tort Claim Does Not Rise To The Level Of A Constitutional Violation. The General Rule Is That Governments Do Not Owe A Constitutional Duty To Guarantee Minimal Levels Of Safety And Security To The Public And To Protect Them From Harm. There Is No Conflict Among The Circuits As To Recognizing Or Applying Either The "State-Created Danger" Exception Or The "State-Restricted Alternatives" Exception. Neither The "State-Created Danger" Exception Nor The "State-Restricted Alternatives" Exception Applies Under The Facts In This Case.

The Indiana Court Of Appeals properly held that Plaintiffs' allegations of wrongdoing by a governmental commuter train service are insufficient to transform this traditional state tort action into a constitutional civil rights claim. *In re: Train Collision in Gary, Indiana*, 670 N.E.2d 902 (Ind. Ct. App. 1996) (Plaintiff's Petition, at B-13.) In holding that Plaintiffs failed to state a claim under 42 U.S.C. § 1983, the Indiana Court of Appeals relied on this Court's decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992).

In *Collins*, this Court specifically held that the Due Process Clause of the Fourteenth Amendment serves as a limitation on the government's power to act, "*not as a guarantee of certain minimal levels of safety and security.*" *Collins*, 503 U.S. at 126 (emphasis added). As the Indiana Court of Appeals recognized, the facts of the present case are similar to those in *Collins* where a sanitation department worker died of asphyxia after being sent into a manhole to unstop a sewer line in the course of his government employment. The Court in

Collins held that the city's alleged custom and policy of deliberate indifference towards the safety of its employees did not rise to a constitutional violation because the constitution does not impose any affirmative obligation upon governmental actors to provide minimal levels of safety and security. *Id.* at 129-30. The facts in *Collins*, as in the present case, give rise to a typical state law tort claim, not a constitutional violation. *Collins*, 503 U.S. at 128.

The Indiana Court of Appeals, in concluding that Plaintiffs failed to state a constitutional violation, also relied on *Searles v. Southeastern Pennsylvania Transp. Auth.*, 990 F.2d 789 (3d Cir. 1993), a railroad collision case nearly identical to the present case. The Third Circuit in *Searles* determined that passengers on a commuter train operated by a municipality do not have a constitutionally protected right to safe passage on that train, and applied the fundamental constitutional principles discussed and applied in *Collins*.

In *Searles*, the wife of a passenger who was killed in the derailment of an elevated train car brought an action against the regional transit authority and individual employees. The primary defendant in *Searles*, as in the present case, was a governmental commuter rail service. The plaintiffs in *Searles* alleged, as in the present case, that the governmental entity engaged in a policy and custom of following a "grossly negligent" maintenance, inspection and repair program "in reckless disregard for the safety of the public" and with continuing "deliberate indifference to the rights of others." *Searles*, 990 F.2d at 790. The plaintiffs alleged that because of these acts, the commuter rail service and its employees deprived persons who used the public transportation of safe and con-

tinued enjoyment of life and liberty without due process of law, thereby entitling the plaintiff to bring an action pursuant to 42 U.S.C. § 1983.

The Third Circuit, relying on the Supreme Court's analysis in *Collins*, held that the plaintiffs could not state a constitutional claim under the facts in that case. The Court of Appeals confirmed that the Fourteenth Amendment was designed to prevent government oppression rather than to guarantee certain minimal levels of safety and security. *Searles*, 990 F.2d at 792. The Court of Appeals in *Searles* reasoned as follows:

> *Plaintiff here was not deprived of liberty when he voluntarily chose to ride the El.* Therefore, just as in *Collins*, these cases are "quite different from" cases where the Court recognized "a duty to take care of those who have already been deprived of their liberty"—custodial cases. *Id.* Accordingly, we agree with the district court that "*to find that the federal constitution imposes a duty on SEPTA to provide its riders with minimal levels of safety and security would be contrary to the holding in Collins.* If the constitution does not impose a duty upon the government employer to provide its employees with a safe working environment . . . *it [does not] impose[ ] a duty on SEPTA to provide a safe passenger environment.*" (Citations omitted).

Searles, 990 F.2d at 792. The Third Circuit in *Searles* specifically determined that the "state-created danger" exception, even if a viable theory of constitutional liability, was not applicable under the facts of that case. *Searles*, 990 F.2d at 793; *Mark v. City of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 165, 133 L.Ed.2d 107 (1995).

Plaintiffs, relying on decisions from the Third Circuit and the Eighth Circuit, contend in their Petition that there is confusion among the federal circuit courts as to whether a "state-created danger" exception exists, and that this Court should review the present case to resolve this question. (Plaintiffs' Petition, at 14-15, *citing Mark v. City of Hatboro*, 51 F.3d 1137 (3d Cir. 1995) and *Dorothy J. v. Little Rock School Distr.*, 7 F.3d 729 (8th Cir. 1993)). Plaintiffs' argument is flawed because Plaintiffs have mischaracterized the state of the law in both the Third and Eighth Circuits. Contrary to Plaintiffs' allegations, the Third Circuit in *Mark* did *not* reject the "state-created danger" exception. Rather, as the court pointed out, the Third Circuit simply had not had occasion to decide whether the "state-created danger" exception was a viable mechanism for establishing a constitutional injury. *Mark*, 51 F.3d at 1152. The court in *Mark* held that the "state-created danger" exception, even if a viable constitutional theory, did not apply under the facts of that case:

> [W]e have found language in the cases supporting and opposing the existence of a state-created danger theory. Perhaps at some point we will have to harmonize our cases. But we have not reached that day, because even assuming that a plaintiff can state a constitutional violation based on the state-created danger theory, there can be no liability in this case.

Mark, 51 F.3d at 1152.

Plaintiffs' claim of a conflict among the circuit courts is further undermined by the fact that the Third Circuit has since held that, under the appropriate facts, the court *does* recognize the "state-created danger" exception

as a viable theory. *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996). The court in *Kneipp* held as follows:

> Under the particular circumstances of this case, we hold that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983.

Id. at 1211.[1]

Plaintiffs' reliance on *Dorothy J. v. Little Rock School Dist.*, 7 F.3d 729 (8th Cir. 1993) to show a conflict among the circuit courts is also misplaced. Prior to its decision in *Dorothy J.*, the Eighth Circuit in *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993), specifically recognized the "state-created danger" exception as a viable theory for imposing liability under Section 1983. The Eighth Circuit in *Dorothy J.*, noting that the court previously recognized the "state-created danger" exception in *Gregory*, held that under the facts in *Dorothy J.*, the exception simply did not apply. *Dorothy J.*, 7 F.3d at 733. Thus, Plaintiffs in the present case have failed to cite one decision rejecting the "state-created danger" theory, and have failed to show any conflict among the circuit courts.

The Indiana Court of Appeals properly held that the alleged wrongdoing by train engineer Willard Blewett and the other railroad defendants in the present case is insufficient to impose liability under the Due Process Clause of the Fourteenth Amendment, and that the

---

[1] The court in *Kneipp* once again pointed out that the facts of *previous* cases reviewed by the court did not support application of the exception and therefore the court had not yet definitively ruled whether the "state-created danger" exception was a viable theory within the Third Circuit. *Id.* at 1205.

Plaintiffs' claims are appropriately governed by traditional state law tort principles. This is particularly the case since the only allegations of wrongdoing against Willard Blewett arise out of his operation of the westbound train. The Indiana Court of Appeals properly relied on this Court's opinion in *Collins*, as well as the decisions in *Searles* and other cited cases, in holding that the "state-created danger" exception does not apply under the facts of this case. The Indiana Court of Appeals' decision is consistent with decisions of this Court, with the decisions of other federal courts, and with the fundamental constitutional principles underlying those decisions.

To this date, no conflict exists among the circuit courts as to whether the "state-created danger" exception is a viable theory for imposing constitutional violations. Furthermore, this action is not the appropriate vehicle for resolving this question because even assuming the viability of this theory, the "state-created danger" exception does not apply under the facts in this case.

Plaintiffs' claim regarding the "state-restricted alternatives" exception is equally flawed. While Plaintiffs contend that there is confusion among the circuit courts regarding the "state-restricted alternatives" exception, Plaintiffs' legal authority is limited to *dicta* from *one* decision issued by the Seventh Circuit, *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). (Plaintiffs' Petition, at B-10 to B-12) Plaintiffs have not directed the Court to any case law from other circuits regarding the "state-restricted alternatives" exception. On the face of their Petition, Plaintiffs have not demonstrated that any confusion or conflict exists among the circuit courts regarding the "state-restricted alternatives" exception.

In *Archie*, the Seventh Circuit held that a Section 1983 action did *not* lie against a municipality for failing to send a fire department ambulance in response to a call for help. Plaintiffs rely solely on *dicta* in *Archie* to suggest a possible action under the "state-restricted alternatives" exception "if the [governmental entity had] suppressed private ambulance services, or so flooded the market with subsidized (or free) aid that private rescue services no longer could make a profit and hence disappeared." *Archie*, 847 F.2d at 1223.

As in *Archie*, the "state-restricted alternatives" exception does not apply in this case. As the Indiana Court of Appeals held, this is *not* a case where NICTD suppressed available modes of transportation, or flooded the market such that private transportation services disappeared. The Indiana Court of Appeals specifically recognized that alternative modes of transportation, including bus transport and private passenger car, were not in any way suppressed by NICTD.

Moreover, Defendant Willard Blewett was merely a train engineer at the time of the collision. There are no allegations that Willard Blewett played any role in restricting commuter train service in Northwest Indiana. The Plaintiffs' allegations in the present case are not analogous to the scenario suggested by the Court in *Archie*. *Archie* does not support the Plaintiffs' claims that they have been denied a *constitutionally* protected right.

Plaintiffs have failed to show any appropriate basis for review of this case by the Supreme Court. Whether the "state-created danger" and "state-restricted alternatives" exceptions exist need not be decided here since, under

the facts of the instant action, neither exception applies. Furthermore, the issues raised in this case do not rise to the level of paramount importance to the nation.

CONCLUSION

For the foregoing reasons, petitioners have failed to satisfy any ground for a writ of certiorari and the petition should therefore be denied.

Respectfully submitted,

RONALD P. KUKER
Counsel of Record
LAUREN K. KROEGER
HOEPPNER, WAGNER & EVANS
103 East Lincolnway
P.O. Box 2357
Valparaiso, Indiana 46384
(219) 464-4961
(219) 465-0603 FAX

Attorneys for Respondent
WILLARD BLEWETT